No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

IDAHO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Idaho

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a death sentence violates the Sixth, Eighth and Fourteenth Amendments, when it is imposed by a trial judge after the prosecutor has notified the defendant in writing, pursuant to court order, that the state would not seek the death penalty, and defense counsel, relying on the written notice, has made no argument and presented no evidence relating to the statutory aggravating factors or the appropriateness of imposing the death penalty.

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OPINIONS BELOW

The original opinion of the Idaho Supreme Court affirming Petitioner's death sentence was reported at 113 Idaho 688, 747 P.2d 710 (1987) and is reproduced at JA 204. This Court granted a Petition for Writ of Certiorari in *Lankford v. Idaho*, 486 U.S. 1051 (1988) and vacated the judgment and remanded to the Idaho Supreme Court for reconsideration in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988).

The Idaho Supreme Court's opinion on remand, reaffirming its prior decision, is reported at 116 Idaho 279, 775 P.2d 593 (1989), and is reproduced at JA 276.

JURISDICTION

The opinion of Idaho Supreme Court on remand from this Court was issued on April 4, 1989. JA 276. This Petition was filed on May 19, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the assistance of counsel for his defense.

This case also involves the Eighth Amendment to the Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution, which provides in pertinent part:

> No State shall . . . deprive any person of life- . . . without due process of law. . . .

This case also involves a number of provisions of the laws and court rules of the State of Idaho which are lengthy and are therefore included in an Appendix to this Brief.

STATEMENT OF THE CASE

This case involves a death sentence imposed upon Petitioner Bryan Stuart Lankford by Judge George Reinhardt, III, of the Second Judicial District Court, in Idaho County, Idaho, upon a conviction of two counts of first degree felony murder.

A. The Conviction.

Petitioner's murder convictions resulted from his role in the robbery of a married couple, Robert and Cheryl Bravence, at a campground near Grangeville, Idaho, during which the Bravences were killed by Petitioner's older brother, Mark Lankford. In its opinion on direct appeal, the Idaho Supreme Court summarized the facts of the crime thus:

> The brothers came upon the Bravences' campsite and decided to take the Bravences' van. Bryan Lankford walked into the camp armed with a shotgun and engaged the Bravences in conversation. Subsequently, Mrs. Bravence left the group and went to a nearby creek. At this point, Mark Lankford ran into the campsite and ordered Robert Bravence to kneel down on the ground. While kneeling, Mark then hit Robert Bravence over the head with a nightstick. Cheryl Bravence then came up from the creek, and Mark told her to kneel down on the ground and then hit her over the head with the same nightstick. The Bravences were beaten with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined.
>
> The brothers loaded the bodies into the van and headed back into the forest. The bodies were removed from the van and concealed under branches and other debris a short distance from where the Lankfords had abandoned their car. Lankford and his brother then took the van and traveled through Oregon and California before abandoning it in Los Angeles. During their flight from the murder scene they purchased accommodations and food with the Bravences' credit card.
>
> * * *
>
> Lankford's defense theory was that he was only an accessory after the fact. Lankford testified in his own behalf and stated that he was dominated by his older brother who was a violent and dangerous person. He testified that he thought his brother would merely knock out the Bravences, and he had not pointed the shotgun at them upon entering the camp. He also testified that after the murders he was hysterical and remained in the van while his brother hid the

> bodies[1] in the woods. The jury nevertheless found Lankford guilty of two counts of first degree murder.

JA 205-207.

Petitioner's conviction of first degree murder followed inevitably from his testimony and the court's instructions to the jury. Consistent with Idaho's first degree felony murder statute, those instructions said it was

> not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged. . . .

JA 16. The jury was also instructed:

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either . . . commit the act constituting robbery or . . . aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.

JA 17.[2] Pursuant to these instructions, the jury returned a verdict of guilty on both counts of first degree felony murder. R. Trial Vol. II, pp. 244, 250.

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[1] Petitioner's testimony was that he thought the Bravences were alive, but unconscious, at the time Mark carried them into the woods. T. Trial IV 708.

[2] A jury instruction requiring a finding of a specific intent to kill was offered but refused. R. Trial Vol. II, p. 242.

B. The Sentencing.

Petitioner's sentencing was delayed, at the prosecutor's request, until after the separate trial of his brother Mark. Petitioner was called and testified as the state's primary witness at Mark's trial.[3] Pursuant to Idaho law, the sentencing was before the trial judge alone.[4]

At sentencing, Petitioner was represented by a new court appointed lawyer, who was appointed on September 20, 1984 – one week after the the prosecutor filed a formal notice that it "was not" seeking the death penalty in Petitioner's case, JA 26 (original emphasis), and three weeks before Judge Reinhardt imposed a death sentence on Petitioner despite that notice. The sequence of events during this four week period are central to the issue presented here.

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[3] *See State v. Mark Lankford*, 116 Idaho 860, 781 P.2d 197 (1989). Petitioner testified at Mark Lankford's trial under an immunity agreement, approved by Judge Reinhardt, which provided that he would be granted immunity from prosecution and penalty co-extensive with Idaho Code § 19-1114. JA 216. Idaho Code § 19-1114 provides that a person who testifies under such a court approved agreement "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with such agreement, he answered or produced evidence. . . . "

[4] In Idaho, sentencing in both capital and non-capital cases is done by the trial judge alone. Idaho Code § 19-2515. Judge Reinhardt was the trial judge who sentenced both Petitioner and his brother Mark Lankford, to death.

1. The Notice that the Death Penalty Would Not be Sought.

After Petitioner testified in Mark Lankford's trial, Judge Reinhardt granted a defense motion to require the prosecution to notify defense counsel and the court, in writing, whether it would be seeking the death penalty. JA 20, 22. The order on this motion provided:

* * *

> That on or before June 18, 1984, the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;
>
> That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein . . .
>
> > (a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code Section 19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;
> >
> > (b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

JA 22-23.

When the sentencing was continued past the original June date, a new sentencing date of October 12, 1984 was set and the notification order was re-issued on September

6, 1984. JA 24-25. On September 13, 1983, the prosecution filed a written response to that order, which stated:

> In relation to the above named Defendant, Bryan Stuart Lankford, the State through the prosecuting attorney, *will not* be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted.

JA 26 (emphasis in original).

2. The Appointment of New Counsel for Sentencing.

On September 20, 1984, a hearing was held regarding Petitioner's *pro se* request that a new lawyer be appointed to represent him at sentencing. JA 27-28. That hearing marked the first entry into the case of Petitioner's present counsel of record, Joan Fisher. Ms. Fisher was present in the courtroom during the colloquy between Petitioner, the trial court, and counsel, regarding the request for new counsel. JA 29-32. During that colloquy, there was no suggestion, by the court or any participant, that a death sentence could be imposed upon Petitioner despite the prosecutor's notice that the death penalty would not be sought.

Ms. Fisher previously had contact with Petitioner as an Assistant District Attorney in Harris County Texas, where she prosecuted him for a robbery. Trial R. Vol. II, pp. 352-353. On the same day she was appointed, Ms. Fisher advised Petitioner in writing of this fact and the "appearance of a conflict of interest" it created. *Id.* at 354. Petitioner waived the conflict, in a document filed the same date. *Ibid.*

3. Petitioner's Motions Before Sentencing.

In early October, 1984, new counsel filed several motions on Petitioner's behalf: a Motion to Dismiss Trial Counsel, a Motion for a Typewritten Transcript of the Trial, a Motion for a Continuance, and a Motion for a New Trial. JA 35, 38, 46, 47. All those Motions were heard by Judge Reinhardt on October 10, 1984, two days before the scheduled sentencing hearing. JA 47.

The Motion to Dismiss trial counsel Wilfred Longeteig was necessitated by the Motion for a New Trial, which alleged that Mr. Longeteig had rendered ineffective assistance at the trial and pretrial proceedings. JA 51. Mr. Longeteig was discharged; but the court stated that he would "not dismiss Mr. Longeteig as far as an obligation that he has now to stand in the wing, so to speak, to be available to Ms. Fisher and [the defendant]. . . . " JA 53-54.[5]

In support of the Motion for a Typewritten Transcript, Ms. Fisher pointed out to the court: "I was not here during the trial. I've heard no testimony on what has gone before, so what I know is basically what I've read in the Lewiston *Tribune*." JA 54. "I don't know what happened at trial. . . . I have attempted to talk to Mr. Longeteig, but . . . got no response." JA 55. Judge Reinhardt denied this Motion, ruling that – from the

[5] Mr. Longeteig was present at the subsequent hearings. JA 95 However, the record indicates he was not otherwise "available" to new counsel, before or after that date. JA 55; R. Trial Vol. II, p. 428-9.

Preliminary Hearing transcript,[6] trial tapes, and the ability to consult with Mr. Longeteig – counsel had "all the information available to you that you need to adequately prepare for sentencing." JA 60.

The Motion for Continuance sought more time to prepare, both for the Motion for New Trial, and the sentencing hearing. JA 35, 38, 61. In support of the request for a continuance, Ms. Fisher represented to the court:

[6] In connection with its ruling that the Preliminary Hearing transcript would adequately apprise new counsel of the trial testimony, the court asked Mr. Longeteig: "if one wanted to review a transcript of the trial, could one receive the same benefits by reviewing the Preliminary Hearing transcript?" Mr. Longeteig responded "I don't know if – I've heard both. It's probably easier for me to say 'Yes,' but I – I don't know for sure." JA 57. When pressed by the court to agree that "the information contained at the Preliminary Hearing, in essence, is the same as the information that was brought forth at trial," Mr. Longeteig said, "Well, I don't know of any material differences, no." JA 58.

In fact, there were a number of important differences between the preliminary hearing and the trial. Six witnesses testified at trial who did not testify at the preliminary hearing at all. These included three F.B.I. forensic experts who presented key scientific circumstantial evidence. *See* Tr. Trial at 474-502, 553-561. Other witnesses added significant new facts which were not in their earlier testimony. For example, a state forensic expert, Robert Cihak, reported new findings in his trial testimony which bore on the sequence of events during the crime. *See* Tr. Trial 420. Roy Ralmuto, a friend of Petitioner's, described events after the crime that were not mentioned in his earlier testimony. Tr. Trial 593, 608-09, 614. In addition, Mr. Ralmuto and three police officers testified at trial about statements and admissions allegedly made by the Petitioner, which were not in evidence at the preliminary hearing. See Tr. Trial at 513, 601, 610, 650, 828-29.

> It's my opinion that I cannot adequately or effectively represent my client without time to review the transcripts, to review the tapes, to talk with Mr. Longeteig, to ascertain whether or not there are additional witnesses, and, in fact, I believe that there are additional witnesses that I have not yet been able to put in a position where I can bring them up for either the Motion for a New Trial or the Motion for Continuance.

JA 62. She went on to inform the court of one witness – Gretchen Maurer, the mother of Petitioner and Mark Lankford – whom she had contacted but who could not come to court in time for the New Trial Motion or sentencing because of health reasons. JA 62-64. She said Mrs. Maurer would testify

> that she knows Bryan and Mark because she is mother to both of them, that she has known them since they were born, that she knows their relationship, that their relationship is such that Mark is violent, Mark is mean, Mark is a threat to society, Mark has threatened to kill her on occasion, Mark has threatened her sons on occasion, that she is afraid of Mark, that everyone in her family is afraid of Mark, that Bryan is afraid of Mark, was afraid of Mark, and has continued to be afraid of Mark, due to the type of relationship that existed in that family. Her testimony as to my client would be that Mr. Lankford was a peaceful person, . . . that the only time she knew of him being in trouble was when Mark was influencing him, that Mark had the capability to influence him and to influence other members of the family, that Bryan is not a threat to society, that Bryan is not a dangerous person, that Bryan has never acted violently in all the time that she has known him, that Bryan has, in fact, been very supportive of her and has been what every mother wants for a son. Those were not

> her exact words. Consequently, you know, her testimony is relevant and material to the sentencing, obviously. Secondly, she would testify that she had never been contacted by Mr. Longeteig and that I believe that her testimony, given the relationship of Mark and Bryan, would be supportive of Mr. Bryan Lankford's testimony at trial. She would have been a material and relevant witness that should have been called to trial, and, consequently, the fact that Mr. Longeteig never contacted her to even discover whether or not she was an important witness would be supportive of my Motion for New Trial on the basis of ineffective assistance of counsel.

JA 63-64. The state opposed the motion, saying that the testimony of Ms. Maurer and other witnesses to the same effect would be "cumulative, and other people can testify as to the same things." JA 65. Ms. Fisher responded that of "[t]he witnesses that I have thus far discovered- . . . none of these witnesses had ever been contacted before. . . . " JA 69.[7] The court nonetheless denied the continuance, saying "a granting of your Motion for a New Trial or a continuance of your Motion for a New Trial would, obviously, continue the sentencing, and I'm not prepared to do that, and as a consequence, I'll have you proceed on your Motion for a New Trial at this time." JA 71.

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[7] When the court pointed out that "the matter can be raised post-sentencing or by way of appeal by way of Post-Conviction Plea," Ms. Fisher said, "I don't want to be in a position of saying that counsel was ineffective when I was counsel for two months. . . . " JA 70.

In support of the Motion for a New Trial, the defense called several witnesses who knew both Petitioner and Mark Lankford. Each one of them testified that Mark Lankford was a violent person who held a substantial dominating influence over his younger brother. Tr. 10/10/84 at 123-155. Defense counsel also called Mr. Longeteig, who said that he never contacted any of these witnesses because "I felt I had adequate information without talking to all those people." JA 72. Mr. Longeteig acknowledged that he knew before trial that his client "faced a possible death penalty" (JA 73), but he said:

> A So I told him from the start I didn't see a very realistic possibility of a death penalty, but we were very concerned with a fixed life term[8] as opposed to something else."
>
> Q So it's your testimony that you told Mr. Lankford that he wouldn't get the death penalty?
>
> A Yes.
>
> Q Even if he didn't testify?
>
> A Right.

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[8] Under Idaho Code § 18-4004, a sentence of life imprisonment for murder must include "a minimum period of confinement of not less than ten (10) years which . . . the offender shall not be eligible for parole or discharge. . . . " I.C. § 4004. The minimum term may be set at the offender's natural life, making the sentence effectively life in prison without the possibility of parole. *See State v. Eubank*, 114 Idaho 635, 759 P.2d 926, 928 (Ct. App. 1988). In the latter event, the result is commonly referred to as a "fixed life" sentence. Any minimum term of less than life is referred to as an "indeterminate life" sentence. *See also* Idaho Code §§ 19-2113A, 19-2114.

JA 78. Mr. Longeteig also testified that, at Petitioner's trial, he thought "it probably was important . . . that he testified in his own behalf because I wanted to establish a record in his own trial that . . . there was not sufficient evidence to show that he was a triggerman so to speak . . . I think once Bryan's trial was over, . . . we basically had won that point." JA 79.[9]

Bryan Lankford gave similar testimony, regarding the advice Mr. Longeteig gave him about the possible sentences he faced, depending on whether he testified for the State at the trial of his brother, Mark:

> I read into it: if I went ahead and testified, I'd get indeterminate life. If I didn't, I'd probably get fixed life. I believe that's the same way he felt, also.

JA 85. The motion for a new trial was denied. JA 49. The hearing closed at 10:22 p.m., on October 10, with the court reiterating its denial of the motion to continue the sentencing date of October 12. JA 87-88.

During the entire hearing on all these defense motions, neither the court nor counsel for either side indicated at any point that the death penalty remained at issue in the case.

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[9] Mr. Longeteig also testified about the fact that there were plea bargaining discussions which concluded with an agreement between the defense and prosecution that Petitioner would receive an indeterminate sentence with a ten year minimum, upon a guilty plea. JA 79-80; *see* JA 86. The agreement, however, was contingent on a commitment from Judge Reinhardt, who declined to commit himself to a ten year minimum; so the case went on to trial. *Ibid*.

4. Mark Lankford's Motion for a New Trial.

The next day, October 11, Judge Reinhardt heard a motion for a new trial in Mark Lankford's case. Petitioner was subpoenaed by Mark's counsel to testify on that motion, about a statement he made to the Lewiston *Tribune* in June, 1984, recanting his testimony against Mark. JA 89. Petitioner appeared with counsel, who objected to the questioning on grounds of self-incrimination. JA 89-90. Her objection initiated a colloquy, and a recess, after which the parties placed on the record an agreement that Petitioner would be immune from any prosecution arising out of his testimony at that hearing, and that "this testimony would be used for purposes of Mark Lankford's Motion for a new trial and for no other purpose." JA 93. Judge Reinhardt accepted this agreement, and Petitioner then testified – admitting that he made the recantation statement to the newspaper,[10] but reiterating that his trial testimony and his testimony against Mark were the truth. *See* JA 286. Mark Lankford's motion for a new trial was denied.

Again, during the course of this hearing, neither the court nor counsel suggested at any time that Petitioner still faced a possible death sentence.

5. Petitioner's Sentencing Hearing.

Petitioner's sentencing hearing was held the next day, October 12, 1984. At the outset of the hearing, Ms.

[10] Petitioner said that pending sentencing, he had become depressed and was persuaded by his brother Mark Lankford to call a local newspaper and admit to having committed the killings himself when Mark Lankford was not present. *See* JA 281.

Fisher re-urged her motion for continuance, noting that she had no transcript, had been unable to listen to the tape of the trial, and was in "a position of going forward on sentencing without knowing exactly what the Court is considering during the sentencing." JA 99. The motion was denied; the court said "a continuance will not provide you with any significant or additional information that you may need for sentencing."[11] JA 100. No suggestion was made by the court or counsel that Petitioner might be facing a capital sentence.

The defense then called the same lay witnesses who had been called on the new trial motion, who testified to essentially the same facts: Bryan Lankford's non-violent nature, Mark Lankford's violent and dangerous propensities, Mark's dominance of Bryan, and Bryan's fear of Mark. JA 95-97. The defense also called Dr. Michael Estess – a psychiatrist with the State Department of Corrections who had examined Petitioner at the court's request – to testify regarding Bryan's fear of and dominance by his brother. JA 97.

The prosecution presented no evidence at the sentencing, but simply argued in favor of its recommendation of an indeterminate life term. JA 101-103. Regarding the facts of the crime, the prosecutor argued the trial testimony showed:

[11] In denying this Motion, Judge Reinhardt said for the first time that the appointment of co-counsel for sentencing had been the result of "an effort to delay these proceedings" by Petitioner. JA 100. Previously, in granting the motion for new counsel, the judge had specifically abjured any such finding. JA 31.

> I think, what the original intention was was to steal a car to get out of Idaho. It obviously got grossly out of hand. The testimony indicates that Bryan and Mark had a discussion, which other witnesses corroborate . . . and that discussion ultimately led to the taking of the Bravences van. Those things, all taken together, in my view and, apparently, in the jury's view, ultimately resulted in a death occurring as part of a robbery and makes Bryan guilty of murder in the first degree. If it were not for the Felony Murder Rule, there would be a difficulty in the proof in this case and in the conviction of Bryan Lankford, but it was, and that was the law. Bryan does stand, then, convicted of two counts of first degree murder for his participation.

JA 101-102. Regarding the issue of Bryan's dominance by his brother, Mark, the prosecutor said:

> I tend to generally believe the witnesses from Texas, the family members, and I have believed this for a long time: that Bryan has traditionally been a pretty good person, except when he's been around Mark.

JA 102. Regarding the appropriate punishment to be imposed, the prosecutor argued:

> Those are the reasons . . . what his family says about him as to why he would not and I would not and did not earlier recommend the death penalty, as the court required, to be filed in a document. The question now becomes: What are the options left and what is the appropriate thing for the Prosecution to urge to recommend? . . . Seems that the answer lies, again, with Dr. Estes' testimony. That is, in the midpoint of life, age 35 upward, . . . people in general . . . change attitudes and mature, and Dr. Estes' testimony further indicates that there's some rehabilitative potential in Bryan. I

> think, and . . . not knowing what Bryan Lankford would be like in ten years, that that is best – best left with the parole board, and the result in that instance would be an indeterminate life sentence. I think that would be, then, my recommendation to the Court. . . .

JA 102-103. The prosecutor's argument closed with the following colloquy with the court:

> The bottom line is what the family says about him, tempered by what the Doctor predicts, and I think the indeterminate life sentence could do that, giving to the parole board the discretion to keep him longer or to put him back in society at the time he reaches that midpoint in life. That would be my recommendation, your Honor.
>
> THE COURT: I don't understand your recommendation. Are you recommending concurrent indeterminate lifes or consecutive indeterminate lifes?
>
> MR. ALBERS: I'm recommending an indeterminate life sentence.
>
> THE COURT: Concurrent? One's a minimum of ten years, and the other's a minimum of twenty years.
>
> MR. ALBERS: If, in fact, they would be coupled in that fashion. I don't know whether they can be, your Honor.
>
> THE COURT: Well, there's either – if they run consecutively, it's a minimum of twenty years.
>
> MR. ALBERS: If the parole board would do that.
>
> THE COURT: If they run concurrently, it's a minimum of ten years. What are you recommending? A minimum of ten years or a minimum of 20 years?

> MR. ALBERS: I am torn, your Honor. I'm leaving that before the Court. I think there needs to be, though, the indeterminate discretion of the parole board of what the appropriate thing is in view of the heinousness of this crime. I'm not sure. I would leave that with the Court. Leave it in the Court.
>
> THE COURT: So you're recommending somewhere between ten and 20 years?
>
> MR. ALBERS: Basically, yes.
>
> THE COURT: Thank you.

JA 103-104. At no point in his argument did the prosecutor suggest that the court might still impose a death sentence, discuss whether such a sentence was appropriate (except in the reference to his decision not to seek one), or address the applicability of any statutory aggravating circumstances to Petitioner's case; and at no point during the prosecutor's argument did the court reveal it was considering those matters. *See* JA 101-104.

Defense counsel began her argument by advising the court that it was difficult for her "to stand up and present an argument on behalf of Bryan Lankford, due to the lateness in which I was involved in this case. Obviously, I don't have the advantage of knowing what the Court is considering all along." JA 104-105. She went on to introduce her argument, by saying this:

> I'm presently in a position to argue on behalf of Mr. Lankford as to whether he should receive an indeterminate life sentence or a fixed life sentence, and it's not an easy thing to do. . . . I'm in a difficult position because Mr. Albers stands up and he recommends an indeterminate life sentence, which is the least option the Court has available, and obviously . . . I don't want to waste the Court's time, but I think that it's . . . important because I don't know where the Court is. You know, I've had an indication from the testimony that the Court rejected making an opinion prior to trial on – on that particular option. So I'm in a position where I have to argue for Mr. Lankford without having been here in trial, without having, in my opinion, a defense and having been convicted of first degree murder, and I don't think there's any question now with the Prosecutor's recommendation, that an indeterminate life sentence is the appropriate sentence to be given to Mr. Lankford.

JA 105-106. Counsel went on to discuss "the community atmosphere toward the Lankfords," and the negative aspects of Dr. Estess' testimony. JA 106. The latter argument focused on the possibility of rehabilitation and "of Bryan Lankford ever being back in society." JA 109, 114. Counsel posited "the only question before this Court" as whether "the Court [should] give Bryan something to live for?" JA 112.

> [i]t's just a question of whether you give him any hope to, one day, not be a victim, any hope to, one day, be able to stand on his own and be able to repay the people that came up here, be able to show them that their love for him isn't lost, isn't wasted, and I don't think that the Court believes Bryan Lankford deserves a fixed life sentence, and I don't think the Court believes that Bryan Lankford needs a minimum of 20 years. I hope the Court doesn't think that because I think that Bryan Lankford doesn't have the coping mechanism to look at a sentence that says, "You'll be an old man before you ever walk the streets again." I'm asking the Court to give Bryan a chance.

JA 113.

She completed her argument by saying:

> I don't think rehabilitation is a possibility if you take away his hope. We'll ask the Court to give Bryan Lankford the minimum sentence available, which is . . . two indeterminate life sentences to run concurrently.

JA 114. Like the prosecutor, defense counsel did not address at any point in her argument the appropriateness of a death sentence or the existence of any statutory aggravating circumstances or factors which would mitigate against death. JA 104-114.

Judge Reinhardt asked no questions during the course of the defense presentation. At the close of defense counsel's argument, however, he said this:

> Thank you, counsel. Well, the options available to this Court are an indeterminate life sentence or a fixed life sentence for a period of time greater than the number of years he would serve on an indeterminate life sentence, i.e., ten. For example, a fixed term of 40 years or death or a fixed life sentence. So there are a great number of possibilities available to this Court with reference to sentencing in this case. The State and the defense have both suggested and requested that this Court impose an indeterminate life sentence or two indeterminate life sentences. The State has suggested that the Court consider letting those sentences run concurrently or together at the same time. I think one first must analyze what that would mean in this case. That sentence would result in Bryan Lankford being eligible for parole in less than ten years, considering the fact that he's served a considerable amount of time in the County Jail. In view of the recommendation or suggestion that I run

> the two sentences concurrently, the recommendation would be, in essence, that this Court sentence Bryan Lankford to spend, from this day, less than five years in the penitentiary for the murder of each one of the two Bravences, whose names have not yet been spoken today.

JA 114-115. Judge Reinhardt then made a lengthy statement which referred to Petitioner's since-retracted recantation to the Lewiston *Tribune* and Mark Lankford's accusation of him,[12] a report that Petitioner had been in an altercation at the jail,[13] Dr. Estess' testimony, and Petitioner's criminal record. JA 93. On the last issue, the Judge's comments resulted in the following colloquy with counsel (who had prosecuted Petitioner on the Texas charges):

> [THE COURT:] Bryan has been convicted of robbery.

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[12] There was no evidence regarding the substance of Petitioner's statement to the Lewiston *Tribune*, or Mark Lankford's self-serving version of the events, in the record of Petitioner's case at this point. Petitioner's admission that he made the statement to the newspaper was given under assurances from the court it would be used only for purposes of Mark Lankford's new trial motion. JA 93-94. Mark Lankford never testified at either trial; he accused Petitioner of killing the Bravences in a statement for the Presentence Report in his case – which the trial court made part of the record in Petitioner's case on October 15, 1984. JA 97. The Presentence Report in Petitioner's case has Mark repeating Bryan's version of the events, verbatim. JA 125-126.

[13] The report was contained in a Supplement to the Presentence Report, which Petitioner's counsel received on October 10, 1984. JA 148-153. That Report indicated that Petitioner had been involved in a political argument with another inmate, who struck Petitioner in the face. *Ibid.*

MS. FISHER: I don't mean to argue with the Court, your Honor, but a probation in Texas is not considered a conviction.

THE COURT: He was charged with the crime of robbery, placed on probation, and in that particular offense, according to the Presentence Investigation, when he stole – or went into the Safeway, he had upon his person a gun or something that looked like a gun, and to the clerk, I'm sure it mattered not. It was a threat to that clerk of Safeway's, to that clerk's life. It is not as if we are dealing with a totally innocent and clean individual. Now, whether or not he had a gun or something else is something that we will never know because he would have to tell us, and he is a liar, and he is an admitted liar. He's a deceitful individual.

MS. FISHER: Your Honor, I think it's fair to say that the State of Texas couldn't prove that he had a gun.

THE COURT: Counsel, I'm not here to argue with you. Bryan has a violent background, and he's a violent individual.

JA 115-116. Judge Reinhardt then went on to say:

> Now, I think this sentence that has been recommended to me would be contrary to the best interest of society. It would certainly depreciate the seriousness of the crimes that Bryan Lankford has been convicted of, and, in my opinion, seriously undermine the faith that society has in the judicial process. Now, if proper sanctions are not imposed for crime – criminal conduct, crime will, obviously, increase, and society will be put in jeopardy, and they'll be at the mercy of violent individuals such as Bryan Lankford. If I don't impose appropriate sanctions for a crime, eventually the people will by themselves or law enforcement officers will by themselves and,

> then, society, as we know it today, will not continue.

JA 116-117. The judge concluded the hearing with the following comments:

> Now, because I'm not prepared to go along with the recommendation that he receive the minimum, I can't just impose the judgment that I feel is appropriate, obviously, without setting forth specific writting [sic] findings, as required by law, statutory as well as common. And in view of the fact that much of what – or at least some of what I will use to base my decision on is based upon arguments of counsel today and testimony received in this courtroom today, and in view of the lateness of the hour, I am not in a position to render judgment, and as a consequence, the final decision in this case will be prepared after I prepare the requisite findings required of me by law. This matter will be thus taken under consideration. I'll announce my decision on Monday, October 15th, 1984. Mr. Bryan Lankford will be brought into court on that day, and my judgment will be announced.
>
> Is there anything further from the State?
>
> MR. ALBERS: No, your Honor.
>
> THE COURT: From the defense?
>
> MS. FISHER: Your Honor, the only objection I have is that if we can't get the sentencing today – I couldn't get a continuance. I mean I made a Motion for Continuance. I've got my client prepared to be sentenced today. You know, it seems like the Court is playing with him.
>
> THE COURT: Counsel, nobody's playing with anybody here. Nobody's playing with anybody, counsel. I can guarantee you that. The law

requires that I do certain things. The law requires that I do it right. I'm attempting to do so. I need to make those findings, and that will be done on Monday.

MS. FISHER: Can I ask your Honor if you're going to take into consideration the testimony heard at Mark Lankford's sentencing?[14]

THE COURT: With reference to Bryan Lankford's sentencing?

MS. FISHER: Yes.

THE COURT: Absolutely not. The evidence is closed in this case.

MS. FISHER: Will Bryan Lankford be sentenced prior to Mark Lankford's sentencing?

THE COURT: Will Bryan Lankford be sentenced prior to the time Mark Lankford is sentenced?

MS. FISHER: Prior to his Hearing, your Honor.

THE COURT: I do not know. We shall be in recess.

JA 117-119.

The sentencing hearing resumed at 9:38 P.M. on Monday, October 15, 1984.[15] At the outset of that hearing, defense counsel and the prosecutor acknowledged receipt of the Presentence Reports prepared in reference to both

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[14] Mark Lankford's sentencing was scheduled for the same Monday, October 15, 1984. JA 96.

[15] This nighttime proceeding followed the sentencing hearing in Mark Lankford's case, which lasted all day that day.

Petitioner and Mark Lankford. JA 97.[16] When asked whether there was any legal cause judgment should not be pronounced, the defense offered the grant of immunity that was given in conjunction with Petitioner's testimony at Mark Lankford's trial (*see* Note 3, above); the court rejected the argument. JA 98. Petitioner was then asked if he wished to make any statement in reference to sentencing; he said he did not. JA 98. Again, during this colloquy nothing was said by any party or the court indicating that a death sentence was impending.

Judge Reinhardt then began to read from a document entitled Findings of the Court in Considering Death Penalty. JA 98. In those Findings, he found five statutory aggravating circumstances defined by Idaho Code § 19-2515(f) were present in Petitioner's case – every one of which involved the circumstances of the offense and the trial testimony which defense counsel had not seen or reviewed.[17] The Findings also elaborated on the court's

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[16] The Presentence Report in Petitioner's case contained no reference to the possibility of a death sentence, or the existence or nonexistence of any statutory aggravating circumstances. JA 120-153.

[17] The statutory aggravating circumstances identified were:

> (a) At the time the murder was committed, the defendant also committed another murder . . . ;
>
> (b) The murders . . . were especially heinous, atrocious or cruel, and manifested exceptional depravity . . . ;
>
> (c) By the murder, or circumstances surrounding its commission, the defendant exhibited an utter disregard for human life . . . ;

(Continued on following page)

interpretation of the evidence of the crime, and Petitioner's involvement in it, in a section entitled "Reasons Why Death Penalty Was Imposed." JA 158-160.[18] They went on to give a variety of other reasons for the decision which were not the subject of testimony or argument at

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(Continued from previous page)

> (d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths . . . ;
>
> (e) The defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

JA 154.

[18] With specific reference to the acts causing death, this portion of the Findings said "the murders were intentionally committed by Mark and Bryan Lankford, each of whom, with the assistance of the other, caused the skulls of a young couple, Mr. and Mrs. Bravence, . . . to be smashed." JA 158. They went on:

> Mark and Bryan . . . caused the skull of Mr. Bravence to be smashed. . . . Then the skull of Mrs. Bravence was caused to be smashed by the Lankfords. This court does not know how many times the head of Mr. Bravence and Mrs. Bravence was struck or with what their heads were struck. . . . This court does not know how many blows were struck by Bryan Lankford or how many blows were struck by Mark Lankford. The evidence clearly shows and this court finds that both Bryan Lankford and Mark Lankford committed acts of force and violence directly upon the persons of Mr. and Mrs. Bravence, which acts directly and proximately caused the deaths. . . . "

JA 159.

the sentencing hearing. See JA 158-163. After the court read its judgment, the hearing ended.[19]

C. The Postconviction Proceedings.

After sentencing and before appeal, pursuant to Idaho's consolidated capital appellate procedure,[20] Petitioner filed a Petition for Post Conviction Relief. JA 166. In that Petition he argued, among other things, that his rights under the United States Constitution had been violated by the "trial court's imposition of the death penalty despite the State's written notice that the State would not seek the death penalty." JA 168. The State moved for Summary Disposition, arguing that this issue was one for appeal which required no factual determinations. R. Post-Conviction, Vol. I, p. 214. Judge Reinhardt[21] rejected Petitioner's claim. These were the reasons he gave orally for that decision:

> The petitioner has failed to show that he did not have notice that the death penalty could be

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[19] Immediately after the pronouncement of Petitioner's sentence, Judge Reinhardt reconvened Mark Lankford's case, and sentenced him to death – in Findings which in large parts tracked those in Petitioner's case word for word.

[20] Idaho law provides for an expedited appellate procedure for capital cases. The post-conviction action must be brought before direct appeal, within 42 days of the imposition of sentence. Idaho Code § 19-2719 is the only State post-conviction action available, absent a showing of good cause.

[21] Petitioner unsuccessfully moved to recuse Judge Reinhardt from the Postconviction proceedings, in part because he was a witness to the underlying facts. R. Post-Conviction, Vol. I, p. 208.

imposed for the offenses he was found guilty for. Idaho Code 18-4004, says that punishment for first-degree murder is life imprisonment or death. Certainly, the statute serves as notice of what punishment might be imposed. The court made sentencing possibilities clear from the time the defendant first appeared in front of the magistrate. Furthermore, the petitioner's attorneys were well aware that the death penalty might be imposed. The fact that the prosecutor gave notice that he did not intend to seek the death penalty has no bearing on the adequacy of notice to petitioner that the death penalty might be imposed. The prosecutor's determination not to seek the death penalty does not eliminate it as a possible punishment. State's recommendation to the trial court is only advisably [sic], not binding.

JA 200. In his written Order denying the Postconviction Petition, Judge Reinhardt held:

> Petitioner was advised from the beginning of the proceedings that the death sentence could be imposed if he was convicted of the crimes with which he was charged. Petitioner knew that the court might impose the death penalty and that the State's recommendation in this regard was not binding on the Court.

JA 203. The Order did not specify the factual basis for these conclusions.

D. The Appeal.

The Idaho Supreme Court affirmed Petitioner's conviction and sentence. Like the trial court, the Idaho Supreme Court did not question whether Ms. Fisher actually knew, prior to the time judgment was pronounced,

that the death penalty remained a possibility in the case. Instead, it addressed the issue in terms of the constructive notice provided by the warnings regarding possible penalties given Petitioner at his arraignment, and the Idaho statutes defining those penalties:

> The record reflects that at his arraignment the district court expressly advised Lankford that the death penalty was a possible sentence for the crimes he was charged with. Additionally, the United States Supreme Court has pointed out that the "existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder." *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977). Lankford has not cited us to any authority which supports his position that he was entitled to greater notice than that given by the statutes and by the district court.

State v. Lankford, 747 P.2d at 719; JA 220.

Following the Idaho Supreme Court's affirmance, Petitioner's Petition for Writ of Certiorari was granted by this Court and the judgment was vacated and the case remanded for further consideration in light of *Satterwhite v. Texas*, 486 U.S. 289 (1988). *Lankford v. Idaho*, 486 U.S. 1051 (1988); JA 274-275.

In its opinion on remand, in a three/two decision, the Idaho Supreme Court again affirmed Petitioner's sentence, without further comment on this issue. JA 276-288. This Petition followed.

SUMMARY OF ARGUMENT

It is established that a defendant at a capital sentencing hearing is entitled, at least, to the most basic elements of criminal due process: an opportunity to meet the evidence against him, and the effective assistance of counsel in doing so. *Gardner v. Florida*, 430 U.S. 349 (1977).

Notice that the death penalty is at issue at the sentencing hearing is fundamental to these guarantees. Without such notice, a defendant and his counsel cannot intelligently make any of the innumerable decisions about the preparation and conduct of the defense case that must be made before and during a capital sentencing proceeding.

Petitioner and his counsel were denied this most basic kind of notice. Whether or not the Idaho Supreme Court was correct in its determination that, in some circumstances, adequate notice of the possibility of a death sentence is provided by an admonition at arraignment and a generally applicable capital sentencing statute, those did not provide effective notice in this case. The general warnings at arraignment came months before the prosecutor filed a formal pleading which disavowed any request for a death sentence and appeared to take the death penalty out of the case. On its face, the Idaho statutes governing capital (and non-capital) sentencing appeared to require the "suggestion" of the prosecution that aggravating circumstances existed, before they could be found. Idaho Code § 19-2515(a). No reported case had held otherwise; to the contrary, a previous Idaho Supreme Court decision had referred to notice by the prosecution of its intent to seek the death penalty as

"mandated" by Idaho law. No Idaho capital defendant had been sentenced to death under this statute, where the prosecution did not seek the death penalty.

In circumstances involving much less momentous questions than life or death, this Court has held that constructive notice of the issues prior to a hearing is insufficient to satisfy due process, where actual notice can readily be provided. The lawyer who represented Petitioner at the sentencing hearing was not involved in the pretrial proceedings, and was denied a transcript of them. The only notice she actually received said the death penalty was *not* at issue; and, if counsel had looked past that, there was nothing in the state's law to reverse the impression it created. In that belief, counsel made no argument for her client's life. When the trial judge then reintroduced the death penalty into the case, by imposing it on the Petitioner, the Constitution was clearly violated.

ARGUMENT

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY THE LACK OF NOTICE THAT THE DEATH PENALTY WAS AT ISSUE, AFTER THE PROSECUTION HAD FORMALLY NOTIFIED THE DEFENSE AND THE COURT THAT IT WOULD NOT SEEK A DEATH SENTENCE AND WOULD NOT PROVE ANY STATUTORY AGGRAVATING CIRCUMSTANCES AT THE SENTENCING HEARING.

This case " 'involves the procedure' employed by the State in selecting persons who will receive the death

penalty." *Gardner v. Florida*, 430 U.S. 349, 363 (1977) (concurring opinion of Justice White). It presents a breakdown in the adversary system of a capital case which appears to be unique in the era since *Furman v. Georgia*, 408 U.S. 238 (1972).[22]

Petitioner's counsel took all her actions, before and during the sentencing hearing, in the belief that the death penalty was not at issue. Both the defense and prosecution shaped their case to the only question apparently before the court: the length of the minimum term the Petitioner should be required to serve before he would be eligible for parole. Neither side made any argument regarding the appropriateness of the death penalty or the existence of the prerequisite statutory aggravating factors. The reason for that is plain: There was no indication that those issues remained in the case, from the time that the prosecution filed its notice that the death penalty would not be sought, until the judge imposed the sentences of death.

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[22] In *Wiser v. State*, 459 S.W.2d 58 (Ark. 1970), a similar event occurred under a pre-*Furman* statute which required a jury determination of the sentence, regardless of the parties' agreement. The jury returned a death sentence despite the arguments of both defense counsel and the prosecutor for life. The Arkansas Supreme Court reversed, because the defendant had been informed at the time of the entry of his guilty plea that a death sentence could be imposed only "if asked by the State. . . . " 459 S.W.2d at 60.

An analogous due process violation occurred, as a result of a series of post-*Furman* statutory changes and retrials, in *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1988) (en banc), *cert. denied* 110 S.Ct. 349 (1989).

This is utterly inconsistent with everything this Court has said about the need for basic due process and special reliability in the decision to impose a capital sentence.

A. A Capital Defendant Is Entitled To The Due Process Of Law At The Sentencing Hearing, Which Includes The Effective Assistance Of Counsel And Notice Of The Matter At Issue.

In *Gardner v. Florida*, the Court held:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128; *Specht v. Patterson*, 386 U.S. 605. The Defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

430 U.S. at 358 (plurality opinion). Justice White's concurring opinion in *Gardner* reached the same conclusion, from the premise that capital sentencing is qualitatively different from other sentencing proceedings. *Gardner v. Florida*, 430 U.S. at 364 (concurring opinion). That premise was established in *Woodson v. North Carolina*, 428 U.S. 280 (1976):

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life

> imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

428 U.S. at 305 (plurality opinion). It has since become an integral part of this Court's Eighth Amendment jurisprudence. *California v. Ramos*, 463 U.S. 992, 999 (1983). As the Court of Appeals for the Eleventh Circuit summarized it several years ago,

> The focus of the Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decision making. [Citations omitted]. Whereas earlier cases had focused on the quantity of information before the sentencing tribunal, recently the Court has shown greater concern for the quality of such information. *Gardner v. Florida*, 430 U.S. at 359, 97 S.Ct. at 1205. Thus, it has recognized the defendant's interest both in presenting evidence in his favor, *Eddings v. Oklahoma*, [455] U.S. [104], 102 S.Ct. 869, 71 L.Ed 2d 1 (1982); *Lockett v. Ohio, supra*, and in being afforded the opportunity to explain or rebut evidence offered against him. *Gardner v. Florida*, 430 U.S. at 362, 97 S.Ct. at 1207. Reliability in the fact finding aspect of sentencing has been a cornerstone of these decisions. *Id.* at 359-60, 362, 97 S.Ct. at 1205; *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2191.

Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982), cert. denied 464 U.S. 1002 (1983). *See also Walton v. Arizona*, 110 S.Ct. 3047, 3060-61 (1989) (concurring opinion of Justice Scalia). In short, "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt

determining phase of any criminal trial." *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (*per curiam*).

Sentencing proceedings generally are subject to certain basic due process protections. See *Specht v. Patterson*, 386 U.S. 605 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948). The Court has not had occasion to specifically address whether those due process standards require any special notice of the issues in a noncapital sentencing proceeding.[23] However it would appear that, capital sentencing is "qualitatively different" from noncapital sentencing in at least three respects that make notice particularly crucial. First, post-*Furman* capital sentencing statutes, like Idaho's, provide for structured hearings, designed to minimize arbitrariness, which closely resemble trials on guilt or innocence. *Arizona v. Rumsey*, 467 U.S. 203 (1984). Second, the capital sentencing decision is a unique " 'reasoned *moral* response to the defendant's background, character and crime.' " *Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989), *quoting California v. Brown*, 479 U.S. 538, 545 (1987) (concurring opinion).[24] And third, the stakes involved in capital sentencing implicate the Eighth Amendment, which requires "that any decision to impose the death sentence be, and appear to be, based on

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[23] That issue is before the Court in *Burns v. United States*, No. 89-7260. Notably, the Solicitor General has conceded in its argument in that case that the law governing capital sentencing differs significantly from that applicable to noncapital sentencing, in this regard. *See* Brief of Respondent at 8 n.3, *Burns v. United States, supra*.

[24] *See also Satterwhite v. Texas*, 108 S.Ct. 1792, 1800 (1988) (concurring opinion of Justice Marshall).

reason. . . . " *Gardner v. Florida*, 430 U.S. at 358; *see Johnson v. Mississippi*, 108 S.Ct. 1981, 1986 (1988).

In matters of far less moment, the Court has held that notice of the matter in issue is a fundamental element of due process. The very essence of procedural due process is the "opportunity to be heard and its corollary, a promise of prior notice." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 550-51 (1978). "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence. . . . " *In re Oliver*, 333 U.S. 257, 273 (1948).[25]

[25] The importance traditionally attached to the provision of notice in legal proceedings is illustrated by the evolution of the system of pleading in English Common Law. *See* IX HOLDSWORTH, A HISTORY OF ENGLISH LAW, 328. "It is absolutely essential that the pleading . . . should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial," *Phillips v. Phillips*, 4 Q.B.D. at 139 (1878) (Cotton, L.J.), (quoted in IX HOLDSWORTH at 330 n.1). Commentators on America's pre-federal code pleading system also emphasize the notice function of such pleadings. *See* Blume, *Theory of Pleading – A Survey Including the Federal Rules*, 47 MICH. L. REV. 297 (1949), *quoting* Roscoe Pound *Report*, 35 A.B.A. REP. 614, 638 (1910) ("[P]leadings exist to notify parties of the claims, defenses and cross-demands of their adversaries . . . "). The shift to notice pleadings in modern federal practice does not reflect a reversal of this history. To the contrary, discovery and pre-trial motions practices actually increase the amount of notice given to the parties and the court. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1946); WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1202 (1987).

> Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense.

Baldwn v. Hale, 68 U.S. 223, 233 (1864).

> "[T]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane v. Central Hanover Trust Co., supra*, at 314, 94 L.Ed. 865.

Goss v. Lopez, 419 U.S. 565, 579 (1973). "A party is entitled . . . to know the issues on which a decision will turn and to be apprised of the factual material on which the [decision maker] . . . relies for decision so that he may rebut it." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974); *see, e.g., Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974); *Vitek v. Jones*, 445 U.S. 480, 496 (1980).

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1950) (concurring opinion of Justice Frankfurter). In the criminal context, where the jeopardy of loss is greatest, the requirement of notice is most exacting.[26]

[26] The Sixth Amendment similarly includes a special requirement of notice of the nature of the charges in criminal prosecutions. *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986).

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). In criminal cases due process requires "timely notice, in advance of the hearing, of the specific issues [the defendant] . . . must meet." *In re Gault*, 387 U.S. 1, 33-34 (1967).

Notice of the issue at hand is also a prerequisite to effective assistance counsel.

> A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Strickland v. Washington, 466 U.S. 668, 686-87 (1984). To be effective, a lawyer must have "the opportunity to participate fully, and fairly in the adversary factfinding process." *Herring v. New York*, 422 U.S. 853, 858 (1975). "[T]he guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45, 69 (1935) can have little influence over a proceeding, the nature of which she does not know. A lack of notice of what is at issue undermines " 'the ability of counsel to make independent decisions about how to conduct the defense.' " *Perry v. Leeke*, 57 U.S.L.W. 4075, 4077 (U.S., January 10, 1989), *quoting Strickland v. Washington*, 466 U.S. at 686. To have a "debate between adversaries

. . . requires . . . giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner v. Florida*, 430 U.S. at 360 (plurality opinion). When counsel cannot comment on such facts because she does not know the decision is being made, the "process loses its character as a confrontation between adversaries, [and] the constitutional guarantee [of effective counsel] is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

This proposition would seem to be beyond debate: the minimum protections of due process appropriate in this context cannot be provided without, at least, notification to the defendant and his counsel that the death sentence is at issue in the proceeding at hand.[27] We submit that constitutional minimum was not met here.

B. Petitioner's Counsel Had Neither Actual Nor Constructive Notice That The Death Sentence Could Be Imposed After The Prosecutor Formally Abandoned The Death Sentence.

Between the time she was appointed to represent Petitioner and the conclusion of all evidence-taking and

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[27] Many states go far beyond this, requiring notice to a defendant, not only of the fact that the death penalty is at issue, but also of the statutory aggravating factors upon which the state will rely, and the evidence it will present, to support its request for the death penalty. *See e.g., People v. Walker*, 222 Cal. Rptr. 169, 180 (1985); *Wright v. State*, 335 S.E. 2d 857, 863-864 (Ga. 1985); *State v. Hamilton*, 478 So. 2d 123, 129 (La. 1985); *State v. Timmons*, 469 A.2d 46, 51 (N.J. Super. 1983); *Greene v. State*, 713 P.2d 1032, 1038 (Ok. 1985) (*dictum*); *State v. Riddle*, 353 S.E.2d 138 (S.C. 1987). Because Petitioner's counsel was not even told the death penalty was at issue, the Court need not decide in this case whether, or when, notice of such specifics is required.

argument on sentence, Ms. Fisher was given no explicit notice that the death penalty was at issue at the sentencing proceeding. She was informed that, a week before her entry into the case, the prosecution had given formal, court-ordered notice that the death penalty was *not* being sought. At no time did the court express any dissatisfaction with the prosecutor's decision to forego the death penalty, indicate any intention to disregard or question that decision, or suggest that a death sentence remained a possible penalty in the case despite the prosecutor's express abnegation of it. Accordingly, Ms. Fisher interposed no objection, presented no evidence, and made no argument, directed at the issue of whether the death penalty should be imposed upon her client.

The Idaho Supreme Court nevertheless held that Petitioner's rights were not violated because he and/or his counsel should have known that death was still at issue. It gave two reasons for this: "at his arraignment the district court expressly advised Lankford that the death penalty was a possible sentence for the crimes he was charged with"; and "the 'existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder.' " *State v. Lankford*, 747 P.2d at 719 (JA 220), *quoting Dobbert v. Florida*, 432 U.S. 282, 298 (1977). Neither of these points can be fairly sustained.

1. The Notification To Petitioner At Arraignment.

It is certainly true that at the initial appearance on October 20, 1983, and at the arraignment on December 1,

1983 – the latter of which occurred over ten months before the sentencing hearing – Petitioner and his brother Mark were told by the court that "the maximum punishment that you may receive if you are convicted on either of the two charges is imprisonment for life or death." JA 4, 14-15.[28] However, that cannot answer the question here: whether Petitioner and his lawyer had adequate notice, almost a year later, that the death penalty remained in the case despite the prosecution's intervening, formal disavowal of any intention to seek the death penalty.

Petitioner's trial lawyer was with him at the time of the arraignment.[29] But later, after trial, that lawyer led Petitioner to believe the death penalty was no longer a possibility – even before the prosecution filed its formal notice that it would not seek death. JA 78. When that formal notice came, Petitioner could only interpret it as meaning what it appeared to say: that the death penalty was no longer at issue. Certainly, nothing in the record told him anything different.

In any event, notice to a client, recorded in a transcript in a court file, is no substitute for actual notice to the client's lawyer, on matters of which counsel must be aware to provide effective representation. *Satterwhite v. Texas*, 108 S.Ct. 1792, 1797 (1988). Petitioner's lawyer at sentencing, Ms. Fisher, was not in the case at the time of

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[28] The court's reference to the possible penalties was part of an extended series of warnings and advisements, preliminary to the entry of a plea. Tr. 12/1/83 at 6-17.

[29] Petitioner had no lawyer at the preliminary appearance. JA 3.

the initial appearance, the arraignment, or any proceedings prior to the prosecutor's notice that it was not seeking death. The transcripts of these earlier proceedings were not prepared until long after the sentencing – despite counsel's request that she be provided such transcripts so she could familiarize herself with the events that had transpired before her entry into the case. JA 46, 54-55. From the time of her appointment until the end of the sentencing hearing, nothing was said in Ms. Fisher's presence indicating that she was involved in a death penalty case.

In the context and in the circumstances of this case, the trial court's brief reference to possible penalties during the initial appearance and arraignment added nothing to the statutory background which set the maximum possible penalties for the offenses charged. These preliminary proceedings, long pre-dating the prosecution's election to forswear the death penalty, provided no greater notice than the capital punishment statutes themselves. If those statutes were not adequate to notify Petitioner and his counsel of the peril of a death sentence at the later sentencing hearing – and we argue below they were not – certainly their summarization by the judge, long before the prosecution announced its election, was not.

2. The Constructive Notice Given By Idaho Law.

The Idaho Supreme Court's ruling that the statutes providing for the death penalty for first degree murder provided "fair warning," which was substituted for

actual notice to defense counsel of the issues at hand – is both legally and factually unsupportable in this case.

There is a significant difference, as a matter of due process and under the Sixth Amendment, between actual and constructive notice to a defendant and his counsel regarding the nature and pendency of proceedings affecting fundamental rights. *See Satterwhite v. Texas*, 108 S.Ct. at 1797. To satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It is long since settled that constructive notice is insufficient where actual notice is practicable. *Ibid; Robinson v. Hanrahan*, 409 U.S. 38, 49 (1972); *Schroeder v. New York*, 371 U.S. 208, 212-214 (1962).

Certainly, in the circumstances here, constructive notice was neither fair nor legally adequate.[30] Although

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[30] The Idaho Supreme Court was wrong in resolving this issue by reference to the standard of "fair warning" found in the *ex post facto* caselaw exemplified by *Dobbert v. Florida*, 432 U.S. 282 (1977). What is in question here is "due process of law 'in its primary sense of an opportunity to be heard and defend [a] . . . substantive right.' " *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), *quoting Brinkerhoff-Ferris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). The notice required to satisfy due process in that sense is very different from the generalized "fair warning that . . . contemplated conduct constitutes a crime," 378 U.S. 355, which is the focus of the *ex post facto* clause. *See Collins v. Youngblood*, 110 S.Ct. 2715 (1990). The "fair warning" principle does not prevent a person from being prosecuted for violating any criminal statute that was on the

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counsel knew a sentencing proceeding was taking place, she had no way of knowing what were the stakes, and her client's interests, in that proceeding. She had every right to assume that, if the death penalty were at issue, some kind of notice would have been given to her to that effect. *Cf. New York v. New York, New Haven, and Hartford RR Co.*, 344 U.S. 293, 297 (1953). Counsel not only had no notice that the death penalty was at issue; she was provided a formal notification that the death penalty was *not* at issue. That created "a false sense of security," which compounded the due process violation here. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Factually, the Idaho Supreme Court's point is unsupportable because nothing in Idaho law said the death penalty could remain in issue after a prosecutor's formal notice to the contrary. The general state sentencing statute provided for hearings "upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment . . . and upon such notice to the adverse party as [the court] . . . may direct." Idaho

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books at the time when he or she acted, even though no state official had called the particular statute to the person's attention. But the prosecution could not proceed under an indictment charging the defendant simply with "violating an extant statute by doing something unlawful"; such a charge would plainly affront due process. *Cole v. Arkansas, supra*. It is, in other words, one thing to be on notice of what the law is for purposes of the obligation to obey it; it is quite another thing to have adequate notice of what is in controversy in a legal proceeding that one is called upon to defend.

Code § 19-2515(a). By all appearances, this explicit notice provision applied to death penalty proceedings, conducted under Sections 19-2515(c)-(f); and those subsections, too, indicated that notice of the issues, prior to a death sentencing hearing, was required.[31] No Idaho case had held otherwise. Indeed, only the year before the Idaho Supreme Court had referred to "notice that the State intended to ask for the death penalty and . . . notice of the State's intent to rely on the aggravating circumstances set forth in I.C. § 19-2515(f)" as among "the procedures mandated in potential death penalty cases" in Idaho. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33, 42 (1983).[32] In no Idaho case, at that time or since, had a

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[31] *See* Idaho Code § 19-2515(c):

> The state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence."

See State v. Osborn, 102 Idaho 405, 631 P.2d 187, 196 (1981) ("Here, the district court expressly informed counsel to disclose the evidence and arguments to be relied upon at the hearing, *and the state did so inform the appellant*." (Emphasis added.))

[32] The law of the state of Idaho applicable to other, analogous contexts, reinforced this by requiring specific notice of the prosecution's intent to seek other types of sentence enhancement. *See State v. Lovejoy*, 60 Idaho 632, 95 P.2d 132, 134 (Idaho 1939) (persistent felony offender). *See also* Idaho Code § 19-2520

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defendant received a death sentence without a request by the state.

Understood against this background, the due process violation here goes beyond a lack of notice. Defense counsel believed, and had every reason to believe, that the prosecutor's action took the issue of the death penalty out of the case. There was no reason to believe that the trial court's order for formal notice of the prosecution's intention was an empty gesture. There was every reason to believe it was intended to do what it appeared to do: to enable defense counsel to prepare to meet an argument for the death penalty, if that was to be at issue in this case. There was no indication, after that notice was given, that the court intended to disregard it, until it was far too late to repair the damage or to put on a viable case against death.

Thus, the proceedings below offend the due process prohibition against procedures which not only fail to inform, but affirmatively mislead, a party and his counsel about the nature of the issues or the potential consequences of their acts.[33] The Idaho Supreme Court's

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(firearm or deadly weapon enhancement); Idaho Code § 19-2520(B)(4) (enhancement for infliction of "great bodily injury"); Idaho Code § 19-2520(C)(4) (enhancement for repeat sex offenses, extortion or kidnapping). *Cf. State v. Edelblute*, 91 Idaho 469, 424 P.2d 739, 750 (1967) (probationer must "be informed of the allegedly violated term or condition of the probation order and the manner and circumstances of his violation so that he can intelligently prepare his defense").

[33] *Bouie v. City of Columbia*, 378 U.S. at 352; *In re Ruffalo*, 390 U.S. 549 (1968); *Raley v. Ohio*, 360 U.S. 423 (1959); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

hindsight decision that, as a matter of state law, the prosecutor's notice did not mean what it appeared to say, cannot retroactively change that fact.

CONCLUSION

The judgment of the Idaho Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

RELEVANT IDAHO CODE SECTIONS

Idaho Code § 18-4001. Murder defined. Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.

Idaho Code § 18-4002. Express and implied malice. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Idaho Code § 18-4003. Degrees of murder.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

Idaho Code § 19-2515. Inquiry into mitigating or aggravating circumstances – Sentence in capital cases – Statutory aggravating circumstances – Judicial findings.

(a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the

punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

(b) Where a person is sentenced to serve a term in the penitentiary, after conviction of a crime which falls within the provisions of section 20-223, Idaho Code, except in cases where the court retains jurisdiction, the comments and arguments of the counsel for the state and the defendant relative to the sentencing and the comments of the judge relative to the sentencing shall be recorded. If the comments are recorded electronically, they need not be transcribed. Otherwise, they shall be transcribed by the court reporter.

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing

all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed;

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

Idaho Code § 19-2516. Inquiry into circumstances – Examination of witnesses. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

Idaho Criminal Rule 32. Standards and Procedures Governing Presentence Investigations and Reports.

The following standards and procedures shall govern presentence investigations and reports in the Idaho courts:

(a) When presentence investigations are to be ordered. The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

(b) Contents of presentence report. A trial judge may request a record check and other background information concerning the defendant prior to sentence without conducting a full presentence investigation of the defendant. However, whenever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and his explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.

(2) Any prior criminal record of the defendant.

(3) The defendant's social history, including family relationships, marital status, age, interest and activities.

(4) The defendant's educational background.

(5) The defendant's employment background, including any military record, his present employment status and capabilities.

(6) Residence history of the defendant.

(7) Financial status of the defendant.

(8) Health of the defendant.

(9) The defendant's sense of values and outlook on life in general.

(10) The presentence investigator's analysis of the defendant's condition. That analysis of the defendant's condition contained in the presentence report should include a complete summary of the presentence investigator's view of the psychological factors surrounding the commission of the crime or regarding the defendant individually which the investigator discovers. Where appropriate, the analysis should also include a specific recommendation regarding a psychological examination and a plan of rehabilitation.

(c) Recommendations concerning sentence. The presentence report may recommend incarceration but it should not contain specific recommendations concerning the length of incarceration, the imposition of a fine or the amount of a fine, or the length of probation or other matters which are within the province of the court. Provided, however, the presentence report may comment generally on the probability of the defendant's successfully completing the term of probation or the defendant's financial ability to pay a fine imposed by the court.

(d) Psychological evaluations. The presentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge.

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Idaho Criminal Rule 33. Sentence and Judgment.

(a) Sentence. (1) Time for judgment and sentence. After a plea or verdict of guilty, if the judgment be not arrested nor a new trial granted, the court must appoint a time for pronouncing judgment and sentence, which, in cases of felony, must, unless waived by the defendant, be at least two (2) days after the verdict. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally to ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. Pending sentence the court may commit the defendant or continue or alter the bail.

* * *

Idaho Criminal Rule 33.1. Procedure Where Death Penalty Is Authorized.

(a) Presentence investigation and sentencing hearing. Whenever a defendant has been found guilty by a jury or has entered a plea of guilty to an offense for which the death penalty is authorized, the trial court shall first order a presentence investigation to be conducted and presented to the court as provided in Rule 32. After receiving the presentence investigation report, and delivering a copy thereof to the defendant or his counsel and to the prosecuting attorney, the court shall upon at least seven (7) days' notice to the parties, hold a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense as provided in section 19-2515, Idaho Code.

(b) Findings of the trial court in capital offenses. After the trial court has held a sentencing hearing involving an offense for which the death penalty is authorized, the trial court shall then make written findings as required by section 19-2515(d), Idaho Code. The trial court shall serve copies of these written findings upon the defendant or his counsel and the prosecuting attorney.

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